Filed 3/16/12 P. v. Coleman CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. THOMAS ANTHONY COLEMAN, Defendant and Appellant.	E052028 (Super.Ct.No. SWF10000662) OPINION

APPEAL from the Superior Court of Riverside County. Dennis A. McConaghy, Judge. Affirmed.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne G. McGinnis, Kristine A. Gutierrez and Marissa A. Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Thomas Anthony Coleman of five counts of lewd acts upon a child (counts 1-5—Pen. Code § 288, subd. (a))[1] and one count of showing harmful material to a minor with the intent to seduce (count 6—§ 288.2). The court sentenced defendant to an aggregate term of incarceration of 12 years consisting of the following: the midterm of six years on count 1; one-third the midterm of six years, two years, consecutive on each of counts 2 through 4; the midterm of six years, concurrent on count 5; and the midterm of two years, concurrent on count 6. On appeal, defendant contends the court abused its discretion in permitting the People to adduce evidence of defendant's commission of prior sexual offenses, that insufficient evidence supported the jury's verdict, and that the court abused its sentencing discretion in declining to grant defendant probation and in imposing consecutive sentences on counts 2 through 4. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

The victim's older sister testified that in the beginning of 2010, she was living with her mother, her mother's boyfriend, her brother, defendant, defendant's brother, and the victim. Defendant had been staying at the home for a couple of months. The victim slept with her. Defendant and his brother shared a room in which they had a television; the victim frequently watched television in that room.

One evening, she was looking for the victim so that they could go to bed. The door to defendant's room was locked. The victim's visiting brother knocked on the door;

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

it took some time for defendant to answer; the victim eventually came out of the room. Defendant's brother was not in the room at the time because he was away from the home.

The next day the victim told his sister that defendant "touched him, and . . . was squeezing his thing . . . ." The victim said defendant "feels him everywhere"; on his legs, arms, and back. Defendant touched the victim a lot of times that night. The victim's sister told their mother, who went to the police.

The victim testified that he was six years old at the time of the incident. The People played a recording of an RCAT[2] interview conducted with the victim on March 31, 2010. During the interview, the victim told the interviewer that "A[n] old man was trying to rape me." He named defendant as the "old man" and described him as fat.[3] The victim elaborated that defendant "was trying [to] touch on me" "[o]n my private" where the victim goes "to the bathroom." He said his mother attempted to retrieve him, but the door to the room was locked.

The victim said that defendant took him into the room and "showed me pictures on his phone. It was a nasty guy humping him." He described the video as reflecting defendant with a boy on the top of the back part of defendant. The victim said his brother knocked on the door to the room until defendant finally opened it.

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[2] RCAT is an acronym for Riverside Child Assessment Team.

[3] The September 30, 2010, probation officer's report listed defendant as 5 feet 10 inches tall and weighing 500 pounds. A confidential psychological profile dated October 5, 2010, reported defendant was 5 feet 1 inch tall and 480 pounds.

The victim told his sister that defendant showed him a picture and was trying to touch his penis. The victim initially denied that defendant actually touched his genitals. Nonetheless, the victim said defendant had his hand inside his own pants during the incident and was moaning. The victim later stated that defendant did squeeze the victim's genitals and that it hurt. When asked how many times it had occurred, the victim reported "Ten. A lot of times." Defendant told the victim not to tell.

The victim's mother reported that defendant moved in with them in November 2009; he moved out in March 2010. For the duration of his stay, defendant shared a room with his brother. After reporting the incident to the police, the victim's mother surreptitiously wore a recording device and spoke with defendant regarding the incident. Defendant acknowledged having pornographic pictures on his cell phone and admitted the victim could possibly have seen some of the photographs.

The People played the audio recording to the jury. During the conversation, defendant repeatedly denied having any sexual contact with the victim. Nevertheless, defendant conceded that the victim had taken his phone and inadvertently seen pornography contained on it.

The victim's mother told defendant that the victim said the incidents occurred more than once. "He said that you [were] touching him all over his body and you touched his private." She said that her children told her the door to defendant's bedroom was normally unlocked, but on the date of the triggering incident the door was locked. Defendant maintained that the victim had fallen asleep in defendant's bed on one or two

occasions while watching television, and defendant had picked him up and carried him to his room; however, defendant denied any further physical contact with the victim.

A forensic psychologist testified that it is not unusual for a minor victim of molestation to be unable to remember how many times an act of sexual abuse occurred, or to endure months of continued sexual abuse before disclosure.

John Doe 2 (JD2) testified that in 1999, when he was 17 and a half, he lived in a facility called Loving Care that cared for individuals whose families could not do so.[4] He suffered from ADHD, bipolar disorder, and short-term memory; he was taking medication. JD2 shared his room with another individual.

Defendant worked at Loving Care during the last three months of JD2's stay. Defendant helped him with his daily medications and chores. Defendant stayed in a separate staff room when working overnight. Clients were not permitted inside the staff room unless a staff member was present.

At some point, defendant called JD2 into the staff room. Defendant convinced him that it was acceptable for men to be sexually active with one another. While on the bed in the staff room, defendant touched JD2's genitals with his hands and mouth. Defendant asked JD2 to reciprocate; defendant placed JD2's hand on defendant's genitals. Defendant then forced JD2 to put his mouth onto defendant's genitals. The door to the staff room was closed during the incident.

[4] Testimony later established JD2 was actually 18 during his stay at Loving Care.

The same type of acts occurred repeatedly during the ensuing three months. All the sexual acts occurred in the staff room. On one occasion defendant touched his genitals to JD2's buttocks. All the sexual acts were against JD2's will. JD2 testified that "He forced me." JD2 told defendant several times that he did not wish to engage in the sexual behavior. On one occasion, defendant threatened JD2.

In June 1999, JD2 moved to another facility. Defendant called that facility on several occasions and told the administrator that he was JD2's father in order to speak with JD2. The Riverside County Sheriff's Department later investigated the matter in order to determine whether JD2 was mentally competent to consent to the sexual acts. During an initial interview, defendant denied any sexual conduct between himself and JD2; however, in a later interview, defendant admitted engaging in a single, consensual act of oral copulation with JD2 approximately three months before JD2 left the facility.

John Doe 3 (JD3) testified that sometime at the end of February or the beginning of March 2010, when he was 15 years old, he walked past defendant's home. Defendant offered him work; as JD3 approached, defendant said, "'I'll suck your dick for $20.'" JD3 declined the offer and reported the matter to the police. JD3 identified defendant from a six-pack photographic lineup.

DISCUSSION

A. EVIDENCE CODE SECTION 1108: EVIDENCE

Defendant contends that the trial court abused its discretion in admitting the testimonies of JD2 and JD3 because the sexual acts they alleged were dissimilar from those charged in the current action. Moreover, defendant contends the admission of the

prior acts evidence denied defendant his constitutional rights to confrontation and due process. We hold the court acted within its discretion in admitting the prior acts evidence and did not violate defendant's constitutional rights.

On August 2, 2010, the People filed a motion in limine seeking to adduce evidence pursuant to Evidence Code section 1108, that a 15-year-old boy walked by defendant's home, where an overweight man who was sitting on the porch yelled, "'I'll suck your dick for $20.00.'" The People also sought to admit evidence that defendant sexually molested a mentally infirm patient at a health care facility where defendant worked as a caregiver in 1999.

The People filed a supplemental trial brief asserting the Riverside County Sheriff's Department had been contacted by JD2's father on November 16, 1999. JD2's father alleged that JD2 had been sexually abused by an employee of the Loving Care Group Home, where JD2 had stayed. JD2 was alleged to have suffered from ADD and Anger Displacement Disorder, and currently suffered from Hyperactivity Disorder and Bipolar Disorder. The People alleged JD2 lived at Loving Care from May to September 1999, and that defendant was a manager of the home from June to November 1999. In November 1999, JD2 relocated to another facility. Defendant called JD2 at the latter facility by posing as JD2's father. JD2 had a breakdown as a result of the call and revealed the abuse.

JD2 had alleged defendant entered his room and told him to have sex with defendant or defendant would "'beat the hell out of him.'" Defendant grabbed JD2's hand and forced it onto defendant's penis. Defendant then performed oral sex on JD2.

Defendant moved behind JD2 and sodomized him until defendant ejaculated. The acts were alleged to have occurred multiple times, were never consensual, and were always conducted under a threat of harm.

At a hearing on the matter, the parties agreed to have the People's investigator confirm at which house JD3 had been propositioned, and to conduct a six-pack photographic identification to determine whether defendant was, in fact, the individual who propositioned him. The parties noted that defendant had been charged with a misdemeanor regarding the incidents involving JD2, but the charge had been dropped. Defense counsel requested time to interview witnesses to the alleged incident between JD2 and defendant. The court continued the matter to permit further investigation.

At a hearing the next day, defense counsel stated that JD2's former roommate at the facility had been interviewed; he reported that the sexual encounters were consensual; however, the roommate was mentally incompetent to testify. Nonetheless, defense counsel indicated there were other potential witnesses she wished to interview. The court responded, "I think you should have a reasonable opportunity to contact those witnesses. . . . I feel uncomfortable letting [JD2] come in, if there are people that could be used to impeach what he's got to say, and they are readily available. We don't know if they're readily available." The court further noted, "If you ask for time to find those witnesses, and there was an appropriate time waiver on the part of your defendant, I would be inclined to give it to you." Defendant waived time and requested a continuance; the court granted the request. A week later the parties stipulated to another continuance.

At the next hearing on August 13, 2010, defense counsel noted that she had attempted to contact two witnesses, but was unable to locate either. JD3 had identified defendant's home as the house at which he was propositioned, and defendant as the individual who propositioned him.

On August 16, 2010, the trial court held an Evidence Code section 402 hearing regarding JD2's competency to testify and the admissibility at trial of his proposed testimony. JD2 testified that he lived in Loving Care in 1999 because he had mental disabilities including ADHD and Bipolar Disorder. He was then, and continued to be, medicated for his conditions.

JD2 testified defendant took him into the staff room to watch television; defendant told him it was okay for men to be sexually active with one another; defendant then placed his mouth on JD2's privates against JD2's will. The sexual touching continued to occur every week in the staff room; the door was always closed.

JD2 initially testified he did not recall defendant ever threatening him; however, he later testified that defendant once threatened to beat him up. He also testified that he only placed his mouth on defendant's genitals due to threats made by defendant. The incidents were always non-consensual. He often complained to defendant that he did not like engaging in the behavior. After the first incident, JD2 continued to watch television with defendant, but not in the staff room. JD2 revealed the abuse to the manager of the subsequent facility he moved into after defendant called him there pretending to be his father. The court impliedly determined that JD2 was competent to testify, and expressly that his testimony was admissible: "It certainly is relevant, and it is prejudicial.

Obviously, it is prejudicial—you would want to get it into evidence. When I weigh everything under [Evidence Code section] 352, I think the prejudicial affect is outweighed by the probative value. I think it is very probative, and I would allow it in."

We review a trial court's decision to permit evidence of a defendant's prior sexual offenses pursuant to Evidence Code section 1108 for an abuse of discretion. (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.) Under that standard, the trial court's ruling will not be reversed unless it "'"exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*Ibid.*)

"'[S]ection 1108 now "permit[s] the jury in sex offense . . . cases to consider evidence of prior offenses *for any relevant purpose*" [citation], subject only to the prejudicial effect versus probative value weighing process required by [Evidence Code] section 352.' [Citation.] 'In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101.' [Citation.] Or, as another court put it, '[t]he charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.' [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 63 (*Loy*).)

1. *JD2*

With respect to defendant's conduct with JD2, defendant had initially been arrested for a violation of Penal Code section 289.6, subdivision (a), which prohibits an employee of a health facility from engaging in sexual relations with a consenting adult confined to such a facility. However, that charge was later dismissed. Such behavior is a qualifying sexual offense for admission of the prior act in a subsequent prosecution for a sexual offense pursuant to Evidence Code section 1108, subdivision (a)(1)(A). However, defendant argues that because defendant was only charged with consensual conduct with an adult on the prior occasion, the behavior was irrelevant to the current charge which involved non-consensual sexual behavior with a minor. We disagree.

First, the fact that defendant was charged with one type of sex offense in the prior case and another in the instant case is not at all relevant to a determination of whether the prior acts evidence was admissible: "'[T]he willingness to commit a sexual offense is not common to most individuals; thus, evidence of *any* prior sexual offenses is particularly probative and necessary for determining the credibility of a witness.'" (*People v. Falsetta* (1999) 21 Cal.4th 903, 912, italics added.) Similarity in the types of sex offenses is not required because "'"[m]any sex offenders are not 'specialists', and commit a variety of offenses which differ in specific character."' [Citation.]" (*People v. Soto* (1998) 64 Cal.App.4th 966, 984.) Second, while defendant may have been charged with consensual conduct in the prior case, JD2 consistently alleged that the sexual acts were not consensual; indeed, he testified that he was "forced" to commit the acts under threats of harm from defendant. Thus, the prior acts evidence was relevant for several

purposes: to establish the identity of the individual responsible for molestation of the victim (*Loy*, *supra*, 52 Cal.4th at pp. 61-62, 64), defendant's willingness to take advantage of vulnerable individuals, and his willingness to abuse a position of trust.

Moreover, the probative value of the prior acts evidence far outweighed its prejudicial effect. Here, whether consensual or otherwise, defendant's sexual behavior with an adult was far less inflammatory than repeated sexual acts with a six year old. Likewise, the People did not spend an undue amount of time on the evidence. (*Loy*, *supra*, 52 Cal.4th at p. 62 ["The facts of the previous offenses, although unpleasant, were not particularly inflammatory compared to the horrendous crime of this case. The evidence was presented quickly and without irrelevant detail."] Defendant exposits *People v. Harris* (1998) 60 Cal.App.4th 727, for the proposition that the prior acts evidence in this case warranted exclusion. However, as *Loy* noted, "Because of the 'broad discretion' trial courts have under section 1108 [citation], a finding of no abuse of discretion in one court's exclusion of evidence has no bearing on whether a different court abused its discretion in admitting evidence in a different trial." (*Loy*, at p. 64.) In *Harris*, only the prior offense was alleged to be forcible and "the evidence of it was 'inflammatory *in the extreme*.'" (*Loy*, at p. 64.) The charged act involved only a breach of trust. (*Ibid*.) Thus here, where at worst, both the prior offense and charged act were committed by force, the admission of evidence on the prior acts did not subject defendant to prejudice of a significantly different nature and quality than those charged.

Finally, defendant's contention that his constitutional rights to confrontation and due process were violated by the unavailability of witnesses to the prior act do not avail

him. The California Supreme Court has found the provisions of Evidence Code section 1108 constitutional and has reaffirmed that principal. (*People v. Falsetta, supra*, 21 Cal.4th at pp. 910-922; *Loy, supra*, 52 Cal.4th at p. 60.) Likewise, the Ninth Circuit Court of Appeals has held constitutional a similar federal rule. (*U.S. v. LeMay* (9th Cir.2001) 260 F.3d 1018, 1024-1027.) The court gave defendant several continuances to permit defendant to further investigate the matter. The fact that one witness was apparently incompetent to testify, and defendant was unable to locate others, did not deprive defendant of a fair trial. Defendant had ample opportunity to cross-examine JD2 and could have chosen to testify himself regarding his version of the prior acts. We do not find a deprivation of defendant's constitutional rights.

2. *JD3*

Defendant similarly alleges that the prior acts evidence involving JD3 was entirely dissimilar to the charged act such that the court abused its discretion in permitting the production of irrelevant evidence. The prior act was violative of Penal Code section 647.6's proscription against annoying or molesting a child, a sexual offense enumerated in Evidence Code section 1108, subdivision (d)(1)(a). Moreover, as noted above, similarity of the types of sexual offenses is not required to admit such evidence pursuant to Evidence Code section 1108. Furthermore, the evidence was relevant. Again, the prior acts evidence was relevant to establish the identity of the individual responsible for molestation of the victim (*Loy, supra*, 52 Cal.4th at pp. 61-62, 64); defendant's interest in homosexual relations; and his willingness to take advantage of vulnerable individuals, here a 15-year-old boy. Finally, the prior act did not involve any actual sexual conduct so

there was no danger that it would prove inflammatory. The evidence was both relevant and more probative than prejudicial. The court acted within its discretion in admitting the evidence concerning JD3.

B. SUFFICIENCY OF THE EVIDENCE

Defendant contends insufficient evidence supported the jury's determination that defendant committed five separate lewd acts upon the victim. We hold sufficient evidence supported the verdict.

"When a defendant challenges the sufficiency of the evidence, '"[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.]' [Citations.] . . . We '"'presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.'" [Citation.]' [Citation.]" (*People v. Clark* (2011) 52 Cal.4th 856, 942-943.)

Here, the People played a recording of the victim's RCAT interview in which the victim reported that defendant had committed the act of squeezing his genitals on or about "Ten" times or "A lot of times." The People likewise played a recording of mother's interaction with defendant in which she alleged the victim told her that the sexual incidents occurred on more than one occasion. The victim's mother testified that defendant lived in her home for approximately five months between November 2009 and March 2010. Thus, substantial evidence supported the jury's determination that defendant had committed at least five separate lewd acts upon the body of the victim.

Defendant maintains the lack of specificity with respect to the evidence of five separate incidents of lewd acts negates the sufficiency of the evidence to support his conviction on all five counts. However, as he acknowledges, such specificity has never been required: "[T]he victim's failure to specify precise date, time, place or circumstance [does not] render generic testimony insufficient." (*People v. Jones* (1990) 51 Cal.3d 294, 315.) Indeed, "the particular details surrounding a child molestation charge are not elements of the offense and are unnecessary to sustain a conviction. [Citation.]" (*Ibid.*) "The victim, of course, must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g., lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us'), to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Ibid.*) Here, the People alleged defendant committed at least one lewd act for each of the five months he lived in the home. As discussed above, substantial evidence supported defendant's convictions on all five counts of lewd acts.

C. SENTENCING

Defendant contends the court abused its discretion in declining to grant defendant probation and in imposing consecutive sentences on counts 2 through 4. We hold the court acted within its discretion.

The probation officer's report dated September 30, 2010, noted that defendant had tested in the medium-high risk category on the Static-99 test, a test aimed at determining a defendant's propensity to reoffend. It was estimated that there was a 19.1 percent likelihood defendant would sexually reoffend within five years and a 27.3 percent likelihood he would sexually reoffend within 10 years. The probation officer noted that defendant refused to take any responsibility for the sexual behavior for which he was convicted. The officer further observed defendant "is considered an immediate danger to society and a poor candidate for rehabilitation." Finally, the officer concluded that defendant "is vastly unsuitable" for a grant of probation "as he does not appear to be remorseful, contends he was 'set up' by [the victim], and has failed to realize the impact of his actions, rendering him a danger to society."

Pursuant to section 1203.067, the court was required to order a psychological evaluation of defendant prior to any consideration of a grant of probation. Dr. Michael Kania prepared a report based upon his psychological evaluation of defendant. He noted that defendant "appears somewhat glib and dismissive with regard to the charges he has been convicted of." Dr. Kania opined, "there is nothing to suggest that a grant of probation would be in the best interest of the victim." He predicted that defendant posed a moderate risk of sexually reoffending. Dr. Kania concluded, "there is good reason to

believe that [defendant] may have some homosexual tendencies (although he denies this) that might cause him to be a risk for sexually offending, particularly with young or adolescent males."

The court noted that it had read both reports and gave an indicated sentence of 12 years. Defense counsel requested the court sentence defendant to an aggregate term of six years imprisonment by imposing the midterm on count 1, and concurrent terms on the remaining counts. The court imposed sentence as indicated. In doing so, the court noted that defendant had a prior misdemeanor conviction for a drug offense, posed a medium to high risk of reoffending according to the results of the Static-99 test, posed a moderate risk of reoffending according to Dr. Kania's evaluation, and had been involved in the Evidence Code section 1108 prior acts offenses. The court concluded, "I think [defendant] is a danger to society."

Sentencing decisions are reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Defendants bear a heavy burden when attempting to show an abuse of sentencing discretion. (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 977-978.)

Defendant never requested that he be granted probation below. The trial court's recitation of factors relating to the likelihood that defendant posed a danger to others was, alone, sufficient to justify its exercise of discretion in declining to grant defendant

probation. (California Rules of Court, rule 4.414(b)(8).) The inclusion of defendant's prior conviction in the court's statement of reasons additionally supported that decision. (California Rules of Court, rule 4.408; see *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1313.) The court acted within its discretion in denying defendant probation.

California Rules of Court, rule 4.425, lists the proper factors for the trial court to consider when choosing whether or not to sentence a defendant consecutively. Factors affecting a decision to impose consecutive sentencing include whether or not: "(1) The crimes and their objectives were predominantly independent of each other; [¶] (2) The crimes involved separate acts of violence or threats of violence; or [¶] (3) The crimes were committed at different times . . . rather than being committed so closely in time and place as to indicate a single period of aberrant behavior." (Cal. Rules of Court, rule 4.425(a)(1)-(3).) The court may also consider any other circumstance in aggravation to impose consecutive, rather than concurrent, sentences. (Cal. Rules of Court, rule 4.425(b).) The factors in California Rules of Court, rule 4.425 are considered guidelines, thus only one factor in aggravation is necessary to support a consecutive sentence. (*People v. Davis* (1995) 10 Cal.4th 463, 552.)

Here, as discussed above, the jury necessarily determined that defendant had committed five separate lewd acts upon the victim at different times. Thus, this factor alone, although not elucidated by the trial court, supported imposition of consecutive sentences. Moreover, again, the trial court's recitation of factors regarding defendant's likelihood of reoffending and prior conviction additionally supported the decision to impose consecutive sentences. The court acted within its sentencing discretion,

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.